The appellant was represented at the trial by counsel whose duty it was to advise him. The plea of guilty was in our opinion a grave mistake because, according to the prosecution case itself, the right of private defence stood out plain as a pikestaff. The omission of counsel, whilst addressing the court in mitigation, to make even a passing reference to the provision in section 100 of the Penal Code which any practitioner, however lacking in experience of criminal law and practice, could not have failed to cite to the court as fully exonerating the appellant for what he had done, showed the gravity of the lapse on the part of defence counsel. It is therefore not surprising that the appellant did not know, as he was not advised, of his right of appeal against the sentence.

The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning M.R. in *Doyle* v. *Olby Ltd.*:[1]

"We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side".

Those words were said in a civil case where counsel had made an erroneous submission on the proper measure of damages. It is even more important that this principle should apply where a man's life or personal liberty is at stake. It had been submitted in a 1914 case before the Court of Criminal Appeal in England that there was no precedent for quashing a conviction where the appellant had pleaded guilty to the indictment: see *Christopher Ingleson*;[2] but the conviction was nevertheless quashed by Lord Coleridge on the ground that the plea of guilty had been made by mistake. There the appellant, on pleading guilty, had handed up a written statement to the recorder which, if believed, was a complete exculpation, and the learned judge said: —

"If the recorder read that, it was clearly his duty to explain to the prisoner that his proper course was to plead not guilty and to have such a plea entered".

Again, in *Griffiths*[3] Lord Hewart L.C.J. held that despite a plea of guilty, the court would review a conviction where there was a good defence in law — the prisoner having pleaded guilty under a misapprehension to bigamy.

In the instant case, where the prosecution case itself clearly raised the right of private defence, which justified infliction of the fatal injury in defence of the appellant's own wife — and it was never suggested that any more force was used than was necessary to prevent the rape from being carried out — we are of opinion that there had been a miscarriage of justice in the conviction itself. The appellant should have been entitled to an acquittal and the plea altered to one of not guilty once the court had been apprised of all the material and undisputed facts which made an unqualified plea of guilty impossible. Not only the extent but the legality of the sentence is in issue.

On the admitted facts, we are of opinion that the proper verdict should have been an acquittal. We accordingly quash the conviction and sentence.

Appeal allowed.

Solicitors: *Allen & Gledhill.*

PETER LAI KHEE-CHIN & ANOR. v. COLLECTOR OF STAMP DUTIES

[A.C.J. (Gill F.J.) April 23, 1973]

[Kuala Lumpur — Originating Motion No. 52 of 1972]

Stamps — Transfer of land by a person to himself and his wife — No beneficial interest in property passing to himself — Whether stamp duty payable — Prohibition on transfer of part of alienated land — National Land Code, s. 214(1)(a) — Stamp Ordinance, 1949, ss. 2, 16(1) and (4) and Item 32(a) of First Schedule.

The first appellant, being desirous of making an *inter vivos* gift of an undivided half interest in certain land belonging to him executed a memorandum of transfer of the whole of his interest in the land to himself and his wife in undivided equal shares. The Collector of Stamp Duty assessed the stamp duty on the whole of the market value of the land. The appellants did not dispute the Collector's assessment of the market value of the land or that stamp duty was payable on the value of the half-share of the land transferred to the wife but they contended that stamp duty was not payable on the value of the other half-share.

Held: as no beneficial interest passed in the half-share under the transfer from the first appellant to himself, stamp duty was only payable on the transfer of a half-share in the land, that being the value of the only beneficial interest which passed under the transfer.

Case referred to:-

(1) *Re Robb's Contract* [1941] 3 All E.R. 186.

CASE STATED.

Roger Tan for the appellants.

Rahmat bin Haji Jamari (Federal Counsel) for the respondent.

Gill F.J.: This is an appeal by way of case stated by the Collector of Stamp Duty on the requisition of the appellants pursuant to section 39 of the Stamp Ordinance, 1949.

The facts of the case stated are that Peter Lai Khee-Chin (the first appellant), being desirous of making a gift *inter vivos* of an undivided half interest in his land held under Q.T.(M) 115 Lot No. 131 Mukim of Ampang, Kuala Lumpur to his wife Susie Chen Moi Ching (the second appellant), executed a memorandum of transfer dated July 19, 1972 whereby he transferred the whole of his interest in the said land to himself and his wife in undivided equal shares. He resorted to this device of conveying the whole of his land to himself and his wife because section 214(1)(a) of the National Land Code provides that the whole, but not a part only, of any alienated land shall be capable of transfer under the Code.

The question submitted by the collector on the case stated for the determination of this court is what stamp duty is chargeable on the memorandum of transfer in question.

Section 2 of the Stamp Ordinance, 1949 defines "conveyance on sale" as including "every instrument and every decree or order of any court, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction". Section 16(1) of the Ordinance provides that "any conveyance or transfer operating as a voluntary disposition *inter vivos*, not being a settlement, shall be chargeable with the like stamp duty

as if it were a conveyance or transfer on sale". Under item 32(a) of the First Schedule to the Ordinance, the stamp duty payable on sale of any property (except stock, shares and marketable securities) is $1 for every $100 or fractional part of $100 of the money value of the consideration or the market value of the property, whichever is the greater. *Prima facie* therefore it would appear that the conveyance with which we are concerned is chargeable with 1% *ad valorem* stamp duty on the value of the whole property.

The value placed by the parties on the whole property included in the said transfer was $40,000, which they thought was a reasonable market value thereof on the date of the transfer. But, upon adjudication pursuant to section 36 of the Ordinance, the collector assessed the market value of the property to be $45,400. He therefore assessed the stamp duty at $454.

The appellants do not dispute the collector's assessment of the market value of the land at $45,400. They also do not dispute that on the value of the half share in the land which Peter Lai Khee-Chin transferred to his wife a stamp duty of 1% is payable, because under the transfer a beneficial interest passes to the wife. But they contend that in the other half share which Peter Lai Khee-Chin transferred to himself the legal interest which passes is purely notional. It is thus argued that in respect of Peter Lai Khee-Chin's half share no beneficial interest passes in the property conveyed or transferred from himself to himself, so that in respect of this notional passing of the beneficial interest no stamp duty is payable. For this argument the appellants rely on section 16(4) of the Stamp Ordinance, 1949 which provides that *"a conveyance or transfer* made for nominal consideration for the purpose of securing the repayment of an advance or loan or made for effectuating the appointment of a new trustee or the retirement of trustee, whether the trust is expressed or implied, or *under which no beneficial interest passes in the property conveyed or transferred,* or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied, *shall not be charged with duty under this section,* and this sub-section shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer."

The appellants also rely on the case of *Re Robb's Contract*[1] in which the Court of Appeal held that the document in question in that case was one under which no beneficial interest in the property conveyed or transferred passed, so that by virtue of section 74(6) of the Finance (1909-10) Act, 1910 no stamp duty was payable on such a document apart from adjudication duty. Section 16(4) of our Ordinance is *in pari materia* with section 74(6) of the English Act.

In assessing the stamp duty on the transfer in question, the Collector took the view that by virtue of section 214(1) of the National Land Code which prohibits the transferor from transfering an undivided share in the said land while retaining an undivided half share for himself, the stamp duty on the said transfer should be 1% of the value of the whole property which passes under the transfer. It is contended in support of this view that the case falls within the ambit of section 16(1) of the Stamp Ordinance, 1949 and that section 16(4) of the Ordinance has no application to the facts of the case. It is further argued that in law the first appellant cannot transfer the property from himself to himself, because to do so would be contrary to the ordinary meaning of the word "transfer", namely, a conveyance from one person to another person. It is next said that the device resorted to by the first appellant is clearly contrary to the provisions of section 214 of the National Land Code. It is lastly said that the case of *Re Robb's Contract* has no application to the facts of this case.

I do not think that the Collector was right in the view which he took as regards the stamp duty payable on the transfer. He is clearly not concerned with the question as to whether the transfer in question contravenes any of the provisions of the National Land Code. That is a matter for the appropriate authority when the transfer is presented for registration. In any event, this was not a transfer of the whole of the land from the first appellant to himself. It was a transfer from himself to himself and his wife so as to make them both co-owners of the property in undivided equal shares. As far as I can see the only prohibition imposed by section 214(1)(a) of the National Land Code is that you cannot transfer a part only of any alienated land. It would therefore be correct to say that the transfer in question does not contravene the provisions of that section.

As I have already said, it is not in dispute that on the value of the half share in the property which the first appellant transferred to the second appellant a stamp duty of 1% is payable, such value being $22,700. As regards the transfer of the half share in the property from the first appellant to himself, it falls squarely within the exemption of section 16(4) of the Stamp Ordinance, 1949. Quite apart from what was decided in the case of *Re Robb's Contract,* section 16(4) of our Stamp Ordinance states quite clearly that a conveyance or transfer under which no beneficial interest passes in the property conveyed or transferred is not chargeable with stamp duty.

In the result, I would hold that the stamp duty payable on the transfer in question is 1% of $22,700 ($227), that being the value of the only beneficial interest in the property which passes under the transfer. I would therefore allow this appeal and make an order that the Collector do refund to the appellants the amount which they have paid in excess of the said sum of $227. I would also make an order that the respondent do pay costs of this appeal which are assessed at $350.

Appeal allowed.

Solicitors: *Allen & Gledhill.*